

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

Paper No. 49

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte WALTER G. HENDERSON, WAYNE F. LARSON,
and PHILIP D. BARRETT

Appeal No. 1997-1632
Application No. 08/138,555

ON BRIEF

Before THOMAS, MARTIN, and BARRY, *Administrative Patent Judges*.
BARRY, *Administrative Patent Judge*.

DECISION ON APPEAL

A patent examiner rejected claims 45-60 and 62-83. The appellants appeal therefrom under 35 U.S.C. § 134(a). After twice remanding the appeal, we affirm-in-part.

BACKGROUND

The appellants' invention programs electronic real estate lockboxes and keys. A real estate lockbox is a strong box housing a mechanical key to a house for sale. A real estate agent uses an electronic "key" to open the lockbox and gain access to the house

key therein. The lockboxes of a large real estate board can number in the tens of thousands, (Spec. at 67), and are distributed over thousands of square miles. (Paper No. 33 at 3.) As houses are sold or newly listed for sale, moreover, the lockboxes are relocated. Keys for the lockboxes can also number in the tens of thousands. (Spec. at 67)

Data programmed in the lockboxes and keys include lists of keys to be locked out, dates on which specific keys are to expire, and hours that certain lockboxes are to be inaccessible. Conventionally, the lockboxes and keys were returned to a board's central office for programming and reprogramming such instructions. (Paper No. 33 at 3.) Alternatively, portable programming units were used to reprogram the lockboxes and keys in the field. (*Id.*)

The invention equips electronic lockboxes and keys with a radio receiver. The receiver permits a memory in each unit to be updated with new data modulated onto a radio frequency ("RF") signal. Consequently, board-wide changes, e.g., changes of lockout lists and access codes, and changes targeted to specific units, e.g., disabling a particular key, can be implemented without returning the lockboxes or keys to a central office or taking programming units into the field.

A further understanding of the invention can be achieved by reading the following claim:

80. In an electronic key for use with an electronic lock, the key and lock being distinct from one another and movable relative thereto, the key including a microprocessor, a battery coupled to the microprocessor, a memory coupled to the microprocessor, a keypad including at least the digits 0-9, the keypad being coupled to the microprocessor, and a communications port for sending signals to the lock, an improvement comprising:

a receiver for receiving electromagnetic radio frequency signals;
and

a decoder coupled to the receiver for providing data corresponding to a received radio frequency signal to the memory to change data stored therein;

wherein characteristics of the key can be programmed remotely.

Claims 45, 46, 48, 50-53, 55-60, 68-70, and 73-80 stand rejected under the judicially created doctrine of obviousness-type double patenting as unpatentable over claims 1 and 2 of U.S. Patent No. 5,245,652 ("Larson") alone and over Larson in view of U.S. Patent No. 3,337,992 ("Tolson"). Claim 54 stands rejected under the doctrine as unpatentable over claim 1 of U.S. Patent No. 5,602,536 ("Henderson").

Claims 45, 46, 48, 50, 51, 55-57, 59, and 60 stand rejected under 35 U.S.C. § 103 as obvious over U.S. Patent No. 4,415,893 ("Roland") in view of Tolson. Claim 47 stands rejected under § 103 as obvious over Roland or U.S. Patent No. 4,760,393 ("Mauch '393") in view of Tolson further in view of U.S. Patent No. 4,236,068

("Walton '068"). Claims 49, 53, and 54 stand rejected under § 103 as obvious over Roland in view of Tolson further in view of U.S. Patent No. 4,531,237 ("Bar-on") even further in view of U.S. Patent No. 4,469,917 ("Shelley"). Claims 52 and 63-66 stand rejected under § 103 as obvious over either Roland, Mauch '393, or U.S. Patent No. 4,721,954 ("Mauch '954") in view of Tolson further in view of Bar-on. Claim 58 stands rejected under § 103 as obvious over either Roland, Mauch '393, or U.S. Patent No. 4,218,690 ("Ulch") in view of Tolson further in view of U.S. Patent No. 4,609,780 ("Clark '780"). Claim 62 stands rejected under § 103 as obvious over Roland in view of Tolson further in view of U.S. Patent No. 4,600,829 ("Walton '829"). Claim 67 stands rejected under § 103 as obvious over Roland in view of Tolson further in view of U.S. Patent No. 4,831,374 ("Masel").

Claim 68 stands rejected under § 103 as obvious over (Mauch '393) in view of Tolson. Claim 69 stands rejected under § 103 as obvious over either Mauch '393 or Ulch in view of Tolson further in view of U.S. Patent No. 4,829,296 ("Clark '296"). Claim 70 stands rejected under § 103 as obvious over either Roland, Mauch '393, or Ulch in view of Tolson further in view of Clark '780. Claim 71 stands rejected under § 103 as obvious over either Roland, Mauch '393, or (Mauch '954) in view of Tolson further in view of Bar-on. Claim 72 stands rejected under § 103 as obvious over Roland in view of Tolson further in view of Masel.

Claims 73, 74, 77, and 78 stand rejected under § 103 as obvious over Ulch in view of Tolson. Claim 75 stands rejected under § 103 as obvious over either Mauch '393 or Ulch in view of Tolson further in view of Clark '296. Claims 76 and 79 stand rejected under § 103 as obvious over either Roland, Mauch '393, or Ulch in view of Tolson further in view of Clark '780.

Claims 80 and 81 stand rejected under § 103 as obvious over U.S. Patent No. 4,727,369 ("Rode") in view of Tolson further in view of Clark '296. Claim 82 stands rejected under § 103 as obvious over Rode in view of Tolson further in view of Clark '296 even further in view of Bar-on. Claim 83 stands rejected under § 103 as obvious over Rode in view of Tolson further in view of Clark '296 further in view of Bar-on further in view of Shelley.

OPINION

After considering the record, we are persuaded that the examiner erred in rejecting claims 45, 46, 48, 50-53, 55-60, 68-70, and 73-80 as unpatentable over claims 1 and 2 of Larson alone; in rejecting claims 45, 46, 48, 50-53, 55-60, 68-70, and 73-79 as unpatentable over claims 1 and 2 of Larson in view of Tolson; and in rejecting claim 54 as unpatentable over claim 1 of Henderson.

We are also persuaded that he erred in rejecting claims 45, 46, 48, 50, 51, 55-57, 59, and 60 as obvious over Roland in view of Tolson; in rejecting claim 47 as obvious over Roland or Mauch '393 in view of Tolson further in view of Walton '068; in rejecting claims 49, 53, and 54 as obvious over Roland in view of Tolson further in view of Bar-on even further in view of Shelley; in rejecting claims 52 and 63-66 as obvious over Roland, Mauch '393, or Mauch '954 in view of Tolson further in view of Bar-on; in rejecting claim 58 as obvious over Roland or Mauch '393 or Ulch in view of Tolson further in view of Clark '780; in rejecting claim 62 as obvious over Roland in view of Tolson further in view of Walton '829; and in rejecting claim 67 as obvious over Roland in view of Tolson further in view of Masel.

Similarly, we are persuaded that the examiner erred in rejecting claim 68 as obvious over Mauch '393 in view of Tolson; claim 69 as obvious over Mauch '393 or Ulch in view of Tolson further in view of Clark '296; in rejecting claim 70 as obvious over Roland, Mauch '393, or Ulch in view of Tolson further in view of Clark '780; in rejecting claim 71 as obvious over Roland, Mauch '393, or Mauch '954 in view of Tolson further in view of Bar-on; and in rejecting claim 72 as obvious over Roland in view of Tolson further in view of Masel.

We are further persuaded that he erred in rejecting claims 73, 74, 77, and 78 as obvious over Ulch in view of Tolson; in rejecting claim 75 as obvious over Mauch '393 or Ulch in view of Tolson further in view of Clark '296; and in rejecting claims 76 and 79 as obvious over Roland, Mauch '393, or Ulch in view of Tolson further in view of Clark '780. In addition, we are persuaded that the examiner erred in rejecting claim 81 as obvious over Rode in view of Tolson further in view of Clark '296; in rejecting claim 82 as obvious over Rode in view of Tolson further in view of Clark '296 even further in view of Bar-on; and in rejecting claim 83 as obvious over Rode in view of Tolson further in view of Clark '296 further in view of Bar-on further in view of Shelley.

We are also persuaded that he did not err, however, in rejecting claim 80 as unpatentable over claims 1 and 2 of Larson in view of Tolson or in rejecting the claim as obvious over Rode in view of Tolson further in view of Clark '296. Accordingly, we affirm-in-part. Our opinion addresses the rejections in the following order:

- obviousness-type double patenting rejections of claims 45, 46, 48, 50-53, 55-60, 68-70, and 73-80
- obviousness-type double patenting rejection of claim 54
- obviousness rejections of claims 45-60 and 62-83.

I. Obviousness-Type Double Patenting Rejections of Claims 45, 46, 48, 50-53, 55-60,
68-70, and 73-80

Rather than reiterate the positions of the examiner or appellants *in toto*, we address the two points of contention therebetween. First, the examiner asserts, "[c]laims 45, 46, 48, 50-53, 55-60, 68-70, 73-80, [sic] are rejected . . . over claims 1 and 2 of U. S. Patent No. 5245652 **alone**. . . ." (Paper No. 46 at 3 (emphasis added).) The appellants argue, "[n]othing in the claims of the '652 patent suggests providing data by radio, as specified by each of the rejected claims." (Paper No. 47 at 24.)

"Analysis begins with a key legal question -- *what* is the invention *claimed*?" *Panduit Corp. v. Dennison Mfg. Co.*, 810 F.2d 1561, 1567, 1 USPQ2d 1593, 1597 (Fed. Cir. 1987). Here, independent claim 45 specifies in pertinent part the following limitations: "receiving the modulated radio frequency signal at each of the plurality of first units. . . ." Similarly, independent claim 68 specifies in pertinent part the following limitations: "a radio transmission from the single transmitter. . . ." Similarly, independent claim 68 specifies in pertinent part the following limitations: "a radio transmission from the single transmitter. . . ." Also similarly, independent claim 73 specifies in pertinent part the following limitations: "a receiver adapted to receive electromagnetic radio frequency signals. . . ." Further similarly, independent claim 80 specifies in pertinent

part the following limitations: “a receiver for receiving electromagnetic radio frequency signals. . . .” Accordingly, the independent claims require using a RF transmission.

Having determined what subject matter is being claimed, the next inquiry is whether the subject matter is obvious. “In rejecting claims under 35 U.S.C. Section 103, the examiner bears the initial burden of presenting a *prima facie* case of obviousness.” *In re Rijckaert*, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993) (citing *In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992)). “A *prima facie* case of obviousness is established when the teachings from the prior art itself would appear to have suggested the claimed subject matter to a person of ordinary skill in the art.” *In re Bell*, 991 F.2d 781, 783, 26 USPQ2d 1529, 1531 (Fed. Cir. 1993) (quoting *In re Rinehart*, 531 F.2d 1048, 1051, 189 USPQ 143, 147 (CCPA 1976)). “It is fundamental that rejections under 35 U.S.C. § 103 must be based on evidence comprehended by the language of that section.” *In re Grasselli*, 713 F.2d 731, 739, 218 USPQ 769, 775 (Fed. Cir. 1983) (citing *In re McKellin*, 529 F.2d 1324, 1329, 188 USPQ 428, 433 (CCPA 1976)).

Here, claims 1 and 2 of Larson alone lack any indication of using a RF transmission. Therefore, we reverse the rejection of independent claims 45, 68, 73,

and 80 and of claims 46, 48, 50-53, and 55-60, which depend from claim 45, as unpatentable over claims 1 and 2 of Larson alone.

Second, the examiner asserts, "Tolson teaches that it would have been obvious to one of ordinary skill in the art at the time of the invention to have replaced any wired communication link with a RF modulated wireless communication link." (Paper No. 46 at 3-4.) The appellants argue, "[i]n Tolson, the radio signal that is transmitted is unmodulated." (Paper No. 47 at 8.)

"[T]he Board must give claims their broadest reasonable construction. . . ." *In re Hyatt*, 211 F.3d 1367, 1372, 54 USPQ2d 1664, 1668 (Fed. Cir. 2000). "Moreover, limitations are not to be read into the claims from the specification." *In re Van Geuns*, 988 F.2d 1181, 1184, 26 USPQ2d 1057, 1059 (Fed. Cir. 1993) (citing *In re Zletz*, 893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989)).¹ Here, independent claims 45, 68, and 73 further specify using modulation in the aforementioned RF transmission.

¹ "The PTO broadly interprets claims during examination of a patent application since the applicant may 'amend his claims to obtain protection commensurate with his actual contribution to the art.'" *In re Yamamoto*, 740 F.2d 1569, 1571, 222 USPQ 934, 936 (Fed. Cir. 1984)(quoting *In re Prater*, 415 F.2d 1393, 1404-05, 162 USPQ 541, 550 (CCPA 1969)). "This approach serves the public interest by reducing the possibility that claims, finally allowed, will be given broader scope than is justified. Applicants' interests are not impaired since they are not foreclosed from obtaining appropriate coverage for their invention with express claim language." *Id.* at 1571-72, 222 USPQ at 936 (citing *Prater*, 415 F.2d at 1405 n.31, 162 USPQ at 550 n.31).

(Independent claim 80, in contrast, does not require such modulation and will be treated separately.)

For its part, Tolson teaches that “[w]hile wire paths are shown in FIGURES 2 through 6, it will be apparent to those skilled in the art that energy paths E may equally well be of any other suitable nature, such as . . . a radio signal. . . .” Col. 4, ll. 53-56. Contrary to the examiner’s assertion that the reference discloses a modulated RF link, however, Tolson is silent about the use of modulation in its radio signal. Because Tolson does not use coded data to open and close its windows, but merely sends a signal via the energy paths, moreover, a person of ordinary skill in the art would interpret Tolson as not requiring modulation. Therefore, we reverse the rejection of claims 45, 68, and 73, and of claims 46, 48, 50-53, and 55-60, which depend from claim 45, as unpatentable over claims 1 and 2 of Larson in view of Tolson.

For its part, claim 80 specifies in pertinent part the following limitations: “a decoder coupled to the receiver for providing data corresponding to a received radio frequency signal to the memory to change data stored therein; wherein characteristics of the key can be programmed remotely.” Giving the claim its broadest reasonable construction, the limitations merely require remotely programming a key by transferring

data thereto via the aforementioned RF transmission. Claim 80 does not require using modulation in the RF transmission.

Claim 2 of Larson teaches remotely programming a key by transferring a lockout list thereto. Specifically, “[t]he method of claim 1 . . . further includes: providing, over telephone lines, lockout list data representative of keys that are to be locked out; coupling said lockout list data to a key. . . .” Col. 56, ll. 5-6. Claim 2 only mentions using wired connections, viz., the aforementioned telephone lines.

Tolson, however, teaches that persons skilled in the art would have been motivated to substitute RF connections for such wired connections. Specifically, “[w]hile wire paths are shown . . . , it will be apparent to those skilled in the art that energy paths E may equally well be of any other suitable nature, such as . . . a radio signal. . . .” Col. 4, ll. 53-56. Because wireless devices are easier to move than wired devices – there are no wires to disconnect and reconnect – such a substitution would have facilitated repositioning Roland’s subcontrollers and terminal controllers, which would have advanced the primary reference’s goal of “provid[ing] a complete facility security system that is flexible. . . .” Col. 1, ll. 20-21. Consequently, we find that the prior art as a whole would have suggested combining teachings of the references to

obtain the claimed invention. Therefore, we affirm the rejection of claim 80 as unpatentable over claims 1 and 2 of Larson in view of Tolson.

II. Obviousness-Type Double Patenting Rejection of Claim 54

The examiner asserts, "[t]he subject matter claimed in the instant application is fully disclosed in the [Henderson] Patent and would be covered by any patent granted on that copending application since the referenced copending application and the instant application are claiming common subject matter." (Paper No. 46 at 6.) The appellants argue, "claim 54 of this application and claim 1 of the '536 patent are independent and distinct." (Paper No. 47 at 30.)

The examiner's rejection is based on *In re Schneller*, 397 F.2d 350, 158 USPQ 210 (CCPA 1968). "*Schneller* does not set forth another test for determining 'obviousness-type' double patenting." *Ex parte Davis*, 56 USPQ2d 1434, 1436 (Bd.Pat.App. & Int. 2000).² "While the court in *Schneller* did use a 'cover' test in making the determination that the invention claimed in the patent was not *independent and distinct* from the invention of the appealed claims, we are of the view that the term 'cover' was used by the court as synonymous with not patentably distinct. Thus, under

² "*Schneller* did not establish a rule of general application and thus is limited to the particular set of facts set forth in that decision." *Davis*, 56 USPQ2d at 1436.

the ‘cover’ test, one would ask whether the application claims are *covered* by (i.e., not patentably distinct from) the claims of the patent.” *Id.* at 1436 (internal footnote omitted.)

Here, the inventions specified by claim 54 of the application and claim 1 of Henderson are related as a combination and a subcombination. Inventions in this relationship are patentably distinct if the claimed combination does not require the particulars of the claimed subcombination for patentability, and the subcombination has utility by itself or in other combinations. M.P.E.P. § 806.05(c)(8th ed., Aug. 2001). In this case, the application’s combination of a using a RF transmission to update a key or lock does not require Henderson’s subcombination of “compar[ing] the first and second date data to determine which associated collection of data is the freshest,” Henderson, col. 54, ll. 2-3, for patentability. To the contrary, claim 54 merely mentions that “data . . . *can* be compared with other like data to determine which of two lockout lists respectively associated with said data is the fresher.” (Emphasis added.) Furthermore, the subcombination has separate utility such as ensuring that devices connected by media other than a RF link “both contain the collection of data determined to be the freshest.” Henderson, col. 54, ll. 20-21. Therefore, we reverse the rejection of claim 54 as unpatentable over claim 1 of Henderson.

III. Obviousness Rejections of Claims 45-60 and 62-83

We address the six points of contention between the examiner and the appellants. First, implying that neither Roland, Mauch '393, Mauch '954, nor Ulch uses a RF transmission, the examiner asserts, "to communicate using radio as suggested by Tolson a suitable transmitter and modulator would be required to send data to receiver which include the appropriate demodulator. . . ." (Paper No. 46 at 9-10.) The appellants argue, "[i]n Tolson, the radio signal that is transmitted is unmodulated." (Paper No. 47 at 8.)

As mentioned regarding the obviousness-type double patenting rejections, independent claims 45, 68, and 73 specify using modulation in a RF transmission. As also aforementioned, a person of ordinary skill in the art would interpret Tolson as not requiring modulation. The examiner's conclusory opinion that modulation has been very common in the art does not allege, let alone establish, that one of ordinary skill in the art would have added modulation to Tolson. He fails to allege, let alone show, moreover, that either Walton '068, Bar-on, Shelley, Clark '780, Walton '829, or Masel cures the defect of Tolson. Therefore, we reverse the obviousness rejection of independent claims 45, 68, and 73, and of dependent claims 46, 48, 50-53, and 55-60, which depend from claim 45.

Second, the examiner asserts, “[c]laims 80,81 [sic] are rejected under 35 U.S.C. § 103 as being unpatentable over Rhode [sic] in view of Tolson as applied and [sic] further in view of Clark '296.” (Paper No. 46 at 17.) The appellants argue, “[c]laim 80 specifies that characteristics of the key can be updated *remotely*. Rhode does not teach or even suggest this feature.” (Paper No. 47 at 21.)

As mentioned regarding the obviousness-type double patenting rejections, claim 80 merely requires programming a key remotely by transferring data thereto. The claim, however, does not specify a point of reference for the remoteness. We must give the remoteness its broadest reasonable construction.

For its part, Rhode teaches reprogramming “a radio frequency-coupled proximity key 500. . . .” Col. 3, ll. 61-62. Specifically, “[t]he key 500 is reprogrammed either in the factory or in the local readers. . . .” Col. 4, ll. 26-27. Give the term “remote” its broadest reasonable construction, the reference’s reprogramming in the local readers is done remote from the factory. Conversely, its reprogramming in the factory is done remote from the local readers.

Third, the examiner asserts, “Tolson teaches it would have been obvious to replace any wired communication with a wireless RF communication.” (Paper No. 46

at 17.) The appellants argue, "Clark '296 does not disclose or even suggest . . . the claimed receiver for receiving electromagnetic radio frequency signals. . . ." (Paper No. 47 at 21.)

Claim 80 specifies in pertinent part the following limitations: "a receiver for receiving electromagnetic radio frequency signals. . . ." Giving the claim its broadest reasonable construction, the limitations merely require a RF receiver.

"Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references." *In re Merck & Co.*, 800 F.2d 1091, 1097, 231 USPQ 375, 380 (Fed. Cir. 1986) (citing *In re Keller*, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981)). Furthermore, "[w]hether motivation to combine the references was shown [is] a question of fact." *Winner Int'l Royalty Corp. v. Wang*, 202 F.3d 1340, 1348, 53 USPQ2d 1580, 1586 (Fed. Cir. 2000) (citing *In re Dembiczak*, 175 F.3d 994, 1000, 50 USPQ2d 1614, 1617 (Fed. Cir. 1999); *Monarch Knitting Mach. Corp. v. Sulzer Morat GMBH*, 139 F.3d 877, 881-83, 886, 45 USPQ2d 1977, 1982, 1985 (Fed. Cir. 1998)). "[T]he question is whether there is something in the prior art as a whole to suggest the desirability, and thus the obviousness, of making the combination." *In re Beattie*, 974 F.2d 1309, 1311-12, 24 USPQ2d 1040, 1042 (Fed. Cir. 1992) (quoting *Lindemann Maschinenfabrik GMBH v.*

American Hoist & Derrick Co., 730 F.2d 1452, 1462, 221 USPQ 481, 488 (Fed. Cir. 1984)). “[E]vidence of a suggestion, teaching, or motivation to combine may flow from the prior art references themselves, the knowledge of one of ordinary skill in the art, or, in some cases, from the nature of the problem to be solved. . . .” *Dembiczak*, 175 F.3d at 999, 50 USPQ2d at 1617 (citing *Pro-Mold & Tool Co. v. Great Lakes Plastics, Inc.*, 75 F.3d 1568, 1573, 37 USPQ2d 1626, 1630 (Fed. Cir. 1996); *Para-Ordnance Mfg. v. SGS Imports Int’l, Inc.*, 73 F.3d 1085, 1088, 37 USPQ2d 1237, 1240 (Fed. Cir. 1995)).

Here, the rejection is based on a combination of references that includes Rode and Tolson. Rode only mentions using wired connections. Specifically, “[a] master controller 100 is connected via a two-wire primary bus 102 to a plurality of subcontrollers RMI1-RMI16, and each of the subcontrollers RMI1-RMI16 are in turn connected via a two-wire secondary bus 104 to a plurality of terminal controllers RRI1-RRI16.” Col. 2, ll. 44-49.

Tolson, however, teaches that persons skilled in the art would have been motivated to substitute RF connections for such wired connections. Specifically, “[w]hile wire paths are shown . . . , it will be apparent to those skilled in the art that energy paths E may equally well be of any other suitable nature, such as . . . a radio signal. . . .” Col. 4, ll. 53-56. Because wireless devices are easier to move than wired

devices – there are no wires to disconnect and reconnect – such a substitution would have facilitated repositioning Roland’s subcontrollers and terminal controllers, which would have advanced the primary reference’s goal of “provid[ing] a complete facility security system that is flexible. . . .” Col. 1, ll. 20-21. Consequently, we find that the prior art as a whole would have suggested combining teachings of the references.

Furthermore, Tolson teaches a RF receiver. Specifically, when using a RF signal, “suitable transmitter transducer and **receiver** transducer R are inserted in the energy path as shown in FIGURE 7.” Col. 3, ll. 57-59 (emphasis added). Therefore, we affirm the obviousness rejection of claim 80.

Fourth, implying that neither Rode nor Tolson teaches nor would have suggested the limitations of claim 81, the examiner asserts, “it would have been obvious to change the codes in the lock and the key to provide additional security since Clark here shows that the key can stores a list of unlocking codes to permit the key to open a plurality of locks.” (Paper No. 46 at 18.) The appellants argue, “Clark’s key provides no means to reprogram the lock with which it is engaged. Similarly, neither Mauch [sic] nor Tolson suggests such a feature.” (Paper No. 47 at 21.)

Claim 81 specifies in pertinent part the following limitations: "the memory has stored therein characterization instructions for a lock, and in which the communications port and microprocessor comprise means for transferring said instructions to a lock." Accordingly, the claim requires programing a lock with a key.

The examiner fails to show that Clark '296's storage of unlocking codes to permit a key to open locks teaches or would have suggested programing any of the locks with the key. Therefore, we reverse the obviousness rejection of claim 81.

Fifth, implying that neither Rode, Tolson, nor Clark '296 teaches nor would have suggested the limitations of claim 82, the examiner asserts, "Bar-on et al teaches disabling the receiver during certain periods to save the battery's power." (Paper No. 46 at 19.) The appellants argue, "[t]he examiner did not particularly consider the limitations of claim 82, and thus proposed no rationale why an artisan would have arrived at the claimed combinations." (Paper No. 47 at 22.)

Claim 82 specifies in pertinent part the following limitations: "the memory has stored therein data corresponding to an expiration date for said key." The examiner fails to allege, let alone show evidence, that the combination of references teach or

would have suggested storing data corresponding to an expiration date of a key in a memory of the key. Therefore, we reverse the obviousness rejection of claim 82.

Sixth, implying that neither Rode, Tolson, Clark '296, nor Bar-on teaches nor would have suggested the limitations of claim 83, the examiner observes, "[a] telephone system requires a destination address within the signal to direct the transmitted signal to the specific receiver." (Paper No. 46 at 19.) He asserts, "[i]t would have been obvious to one having ordinary skill in the art to include a reference time signal and an address code to increase to permit communication over a non dedicated system in the above modified data transmission system as suggested by Shelley." (*Id.*) The appellants argue, "[n]othing in Shelley suggests an RF addressing system as claimed by which a radio-equipped key can discriminate received data intended for that key from received data intended for other keys." (Paper No. 47 at 22.)

Claim 83 specifies in pertinent part the following limitations: "means for identifying radio frequency signals carrying data intended for said key, as opposed to other signals intended for other keys." Accordingly, the claim requires distinguishing signals intended for one key from signals intended for other keys.

Because Rode appears to program one key at a time, col. 4, ll. 26-29, the examiner fails to show that distinguishing signals intended for one key from signals intended for other keys would have been desirable. Contributing to the failure is the examiner's explaining the teachings of "Rolands," (Paper No. 46 at 17), rather than Rode. (*Id.* at 17-18.) Therefore, we reverse the obviousness rejection of claim 83.

CONCLUSION

In summary, the rejection of claims 45, 46, 48, 50-53, 55-60, 68-70, and 73-80 under the judicially created doctrine of obviousness-type double patenting over claims 1 and 2 of Larson alone; the rejection of claims 45, 46, 48, 50-53, 55-60, 68-70, and 73-79 under the doctrine over claims 1 and 2 of Larson in view of Tolson; the rejection of claim 54 under the doctrine as unpatentable over claim 1 of Henderson; and the rejections of claims 45-60, 62-79, and 81-83 under § 103(a) are reversed.

The rejection of claim 80 as under the judicially created doctrine of obviousness-type double patenting over claims 1 and 2 of Larson in view of Tolson and of the claim under § 103(a), however, are affirmed. Our affirmance is based only on the arguments made in the briefs. Arguments not made therein are neither before us nor at issue but are considered waived. No time for taking any action connected with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED-IN-PART

JAMES D. THOMAS
Administrative Patent Judge

JOHN C. MARTIN
Administrative Patent Judge

LANCE LEONARD BARRY
Administrative Patent Judge

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